

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA

v.

MARIO RODRIGUEZ,

Defendant

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Criminal No. 03-44-P-S

RECOMMENDED DECISION ON MOTION TO SUPPRESS

Mario Rodriguez, charged with one count of conspiracy to distribute and possess with intent to distribute 500 grams or more of a mixture or substance containing cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846, seeks to suppress the fruits of a search, conducted on May 21, 2003, of his residence, located at 2640 NW 23 Avenue in Miami, Florida. Indictment (Docket No. 13); Motion to Suppress (“Motion”) (Docket No. 35). An evidentiary hearing was held before me on October 10, 2003 at which the defendant appeared with counsel. The government called one witness and introduced one exhibit, which was admitted without objection. The defendant testified in his own behalf. Counsel for the parties argued orally at the close of the hearing. Based on the evidence adduced at the hearing, I recommend that the following findings of fact be adopted and that the motion to suppress be denied.

I. Proposed Findings of Fact

On May 21, 2003 the narcotics bureau of the Miami-Dade police department was assisting federal agents in the investigation of cocaine trafficking with ties to Maine and south Florida. The agents arrested Michael Gilbert and obtained his cooperation with respect to the broker and supplier with whom he had

been dealing in cocaine. Gilbert directed the agents to 2640 NW 23 Avenue in Miami and identified the occupant, the defendant, as someone he had worked with before. The agents were told that there were six kilograms of cocaine at the residence. At around 7 p.m., they went to the residence. Unable to see narcotics inside through a window, Miami-Dade detective Jose Almaguer decided to try to obtain the defendant's consent to a search of the house. Almaguer, who was not in uniform but was wearing a raid jacket, approached the front door with approximately five other officers, some of whom were in uniform.

Almaguer went to the front door with detective Fernandez and their supervisor. The other officers remained in the front yard. The defendant answered Almaguer's knock. Almaguer, who at all relevant times spoke in Spanish, identified himself as a police officer and asked if there was anyone else in the house. The defendant said that there was not. Almaguer directed the other officers to do a security sweep of the interior of the house, and the defendant stepped aside to let the officers enter. Almaguer then asked the defendant if he could talk to him to explain why the officers were there, and he and the defendant, accompanied by other officers, went through the house to a patio at the back, where they sat down at a table and spoke to each other.

Almaguer then explained that the police were conducting a narcotics investigation and wanted to search the house with a K-9 dog to make sure that there were no drugs inside the house.¹ The defendant appeared to understand what Almaguer was telling him and did not seem upset. Fernandez and two other officers were standing near the table. After about five minutes, Almaguer presented the defendant with a form, one side of which was written in Spanish and the other in English, that would provide consent to search the house. The defendant was calm and attentive and Almaguer answered all of his questions.

¹ The dog was left in a police vehicle until consent to the search was obtained.

Almaguer told the defendant that he had the right to tell the officers to leave at any time and the right to deny consent for the search. The defendant told Almaguer that he wanted to wait for the return of his wife, who was on her way to the house, before

consenting to the search. Almaguer replied that there was no need to wait for the defendant's wife because the defendant owned the house and his consent was sufficient. The defendant signed the consent form, a copy of which is Government Exhibit 1, and the search, which took about 30 minutes, was completed before the defendant's wife arrived. Almaguer spoke with the defendant's wife after she arrived and explained what had happened and why. The defendant remained on the patio during the search. The officers found approximately 10 grams of cocaine, marijuana and a firearm in the house. The serial numbers on the firearm had been altered, in violation of, *inter alia*, Florida law. The defendant was then taken into custody.

At some point while the search was going on, the defendant was asked whether the officers could enter an apartment that was only accessible from the patio. The defendant responded that the apartment was rented and asked the officers to wait until the tenant was present. He eventually gave the officers the key to the apartment, and it was searched.

The testimony of Almaguer, the only government witness, and that of the defendant differed in several significant respects. The defendant testified that all of the officers at his front door had their weapons drawn; Almaguer testified that none of the officers drew their guns at any time. The defendant testified that he told Almaguer that he would not sign the consent form until his wife was present in the house and that Almaguer then falsely told him that she was already inside the house, whereupon the defendant signed the form. Almaguer denied telling the defendant this and denied that the defendant was insistent upon waiting for his wife. The defendant testified that he would not have signed the consent form if he had known that his wife was not inside the house but that he would have signed it if she were there. The defendant also testified that one of the officers told him that if he did not give them permission to search the apartment they would break down its door; Almaguer denied that any officer said this.

The defendant testified that he was not afraid of the police but was nervous because so many officers were present. He said that he would not have objected to the initial security sweep if he had been asked. He testified that he did not read the consent form before he signed it and denied that Almaguer went over the contents of the form with him before he signed it. Almaguer testified that he went over the Spanish version of the form with the defendant before the defendant was asked to sign it. The defendant testified that he went to the patio with the officers willingly. He agreed that he did not ask to speak to his wife when Almaguer allegedly told him that she was already inside the house.

II. Discussion

At the hearing, the defendant apparently abandoned the claims made in his written motion to the effect that he was “forcibly directed” to the patio where he was “held against his will;” that he was not informed that he had a right to withhold consent to the search; or that the consent form was written only in English, which he was not able to read. Motion at 1-2. He argued only that his consent was obtained “fraudulently, in an inherently coercive circumstance” and that the search was consequently constitutionally invalid. Specifically, he contended that his consent was not voluntary because it was obtained on the false premise that his wife was inside the house and as a result of being held in a small patio area surrounded by police officers, an inherently coercive situation. The government responded that the defendant had testified that he would have consented if the officers waited until his wife arrived, so that there was no practical impact on the voluntariness of his consent and that whether a defendant is in *de facto* custody at the time he consents to a search is irrelevant to the question whether the consent was voluntary.

In the First Circuit,

[t]he voluntariness of a consent to search [a residence] turns on an assessment of the totality of the circumstances. Among the individualized factors bearing on the vulnerability of the consenting party are age, education, experience, intelligence,

and knowledge of the right to withhold consent. More general considerations include whether the consenting party was advised of his or her constitutional rights and whether permission to search was obtained by coercive means or under inherently coercive circumstances. Although sensitivity to the heightened possibility of coercion is appropriate when a defendant's consent is obtained during custody, custody alone has never been enough in itself to demonstrate coerced consent to search.

United States v. Barnett, 989 F.2d 546, 554-55 (1st Cir. 1993) (citations and internal punctuation omitted). Here, there is no dispute that the defendant was informed of his right to withhold consent. The evidence does not show that the defendant was in custody as a practical matter and there is no evidence of overt coercion. Nothing in my observations of the defendant's age or intelligence leads me to believe that those factors influenced his response to Almaguer in any way. He described his previous experience with the police as favorable. No evidence was presented concerning his education.

I do not find the presence of three or four officers in the patio area when Almaguer obtained the defendant's consent to be inherently coercive. To the extent that the defendant's testimony that all of the officers who entered the house had their weapons drawn bears on this issue, an unlikely event given his testimony that he was not afraid of the police at any time, I find that Almaguer's testimony to the effect that no weapons were drawn is more credible. I note that the defendant never testified that any of the drawn weapons were aimed at him. *See United States v. Kimball*, 741 F.2d 471, 474 (1st Cir. 1984) (fact that officers' drawn weapons were directed away from the defendant among circumstances warranting conclusion that his consent to search was voluntary). Nor does the defendant's asserted nervousness, which Almaguer credibly testified was not apparent and which did not result from any overtly coercive conduct by the officers, vitiate his consent. *See United States v. Esquilin*, 208 F.3d 315, 318 (1st Cir. 2000). On balance, the evidence does not support the defendant's contention that the circumstances under which his consent was obtained were inherently coercive.

With respect to the defendant's claim based on his expressed intent to wait until his wife arrived to give his consent to the search, his testimony that he would have given his consent if she had in fact been present appears to me to be dispositive. The search would still have taken place if the officers had waited for the defendant's wife to arrive. To the extent that the conflict in the evidence concerning what Almaguer said to the defendant on this point must nonetheless be resolved, I conclude that Almaguer's denial that he lied to the defendant is more credible than the defendant's testimony to the contrary. I find it significant that the defendant testified that he did not ask to speak to his wife to inform her that he had consented to the search of their residence or to ask her to observe the search because, as he said, he did not trust the officers, after, as he testified, he had been told that she was present inside the small house. There may have been some misunderstanding between Almaguer and the defendant on this point, but, as the house was already secured and, as the defendant testified, he had told Almaguer that his wife was already on her way home, I see no reason why Almaguer would have lied to the defendant merely to enable the officers to begin searching a few minutes sooner.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to suppress evidence be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 16th day of October, 2003.

/s/ David M. Cohen

David M. Cohen

United States Magistrate Judge

MARIO RODRIGUEZ (2)

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